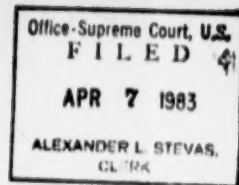


82-6412

No. A-682



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE, PETITIONER

V.

LOUISIANA, RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
FILED ON BEHALF OF THE STATE OF LOUISIANA, RESPONDENT

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STATEMENT OF THE CASE

In 1975, Wayne Robert Felde, plead guilty to manslaughter of a companion. He also plead guilty to four (4) counts of felonious assault against the police officers who participated in his arrest. While serving his sentence for these crimes Mr. Felde escaped from the penitentiary where he was incarcerated. He made his way back to Louisiana, the home of his mother. On October 20, 1978, he was working on a construction job in Shreveport, Louisiana when his sister advised him that law enforcement authorities were seeking his whereabouts. He immediately left the construction site leaving his automobile there. His sister drove him to Lorant's Sporting Goods store where he purchased a .357 magnum pistol and a box of shells. He loaded the pistol outside of the store. His sister left him at a Pizza Inn where he spent the balance of the afternoon drinking beer, eating pizza and drinking in a bar next door.

During the time he was at the bar someone saw the pistol which Felde had concealed on his person. Police were called and Officers Norwood and Tompkins responded. Felde had previously called a cab and Officer Tompkins tried to persuade the cab driver to take Felde from the scene. The cab driver refused. Officer Tompkins then offered to call another cab but Felde refused insisting that he be left alone. The police arrested Felde for simple drunk; they searched his person and found a box of shells. They did not find the pistol which was

concealed in his trousers. Felde told Officer Norwood that his gun was in his car in Mansfield, Louisiana. Officers cuffed Felde with his hands behind him and placed him in the rear of Officer Tompkins' car. There was no partition between the front and back seat of Officer Tompkins' car.

Shortly after Officer Tompkins drove off, William Sweet and John Colvin, who were in a car traveling the same direction as the patrol car heard several gunshots. They saw the brake lights of the patrol car come on and saw the patrol car swerve into the median which separated north and southbound traffic. Tompkins staggered out of the patrol car, crossed the northbound lane of traffic and collapsed. Felde got out of the police car, looked in Tompkins' direction, jumped the guard rail, and fled to a nearby car lot. From there he took refuge in a subdivision of homes hiding between two houses.

Mr. Sweet had seen the man in the back of the patrol car leaning up on the right side of the officer shortly before the first shot was fired. According to the testimony of Mr. Colvin and Mr. Sweet, either three or four shots were fired inside the patrol car.

Shreveport Police officers responded and conducted a house-to-house search for Felde. Officer McGraw found Felde in a crouched position armed with his pistol; Felde's hands were cuffed in front of his body and his pistol was cocked. After unsuccessfully ordering Felde to drop the pistol, McGraw shot him twice with his shotgun. Officers seized Felde's gun where it fell and determined that four live rounds were in the weapon. Another officer found

Officer Tompkins' pistol fully loaded near the median on Mansfield Road.

The coroner of Caddo Parish testified that Officer Tompkins sustained two gunshot wounds. The fatal wound struck him in the right rear flank, traversed a major artery and ultimately lodged in his abdomen. According to the coroner Tompkins died of this gunshot wound.

Identification officers noted two bullet holes in the rear of the front seat of Tompkins' car and three holes on the front of that same seat. Police recovered lead fragments from the car as well as from Tompkins' body. The bullet fragments recovered from Tompkins' body were determined to have been fired by the gun which belonged to Felde.

The Caddo Parish Grand Jury indicted Wayne Robert Felde for first degree murder.¹ Felde was represented by a Court appointed counsel and entered a plea of not guilty and not guilty by reason of insanity.² In accordance with State law the State asked the Court to appoint a Sanity Commission to determine Mr. Felde's sanity at the time of the crime.³ The Court appointed Dr. Norman Mauroner, Dr. Robert Braswell and Dr. Fred Marceau to the Sanity Commission. Dr. Braswell was the coroner of Caddo Parish and a General Practitioner; Drs. Mauroner and Marceau were psychiatrists.

The Louisiana Supreme Court ordered the venue of the trial removed from Caddo Parish to Rapides Parish, Louisiana on motion of the defendant. [See their opinion at 382 So.2d 1384 (1980)] The case was tried August 11th through August 20, 1980 in Rapides Parish. During the trial Mr. Felde presented evidence to support an intoxication de-

fense⁴ and an insanity defense. Regarding the latter the defendant called Dr. Marceau in his case in chief. Dr. Marceau described the psychiatric interview with Felde and commented on Felde's recollection of the crime. Dr. Marceau did not reveal the substance of what Mr. Felde had told him about the crime.⁵ Thereafter Mr. Felde called three expert witnesses in his defense case to testify that he suffered from a mental illness, to-wit: Post-traumatic Stress Disorder and that because of this illness he was legally insane at the time of the crime. Dr. John Wilson, a psychologist with an expertise in the Post-traumatic Stress Disorder, testified that one of the many symptoms characteristic of this illness was an inability to recall details of a traumatic event. Wilson also testified on direct examination concerning the substance of Felde's statements to him during a private interview.

Finally Mr. Felde testified in his own behalf. He recounted the details of the crime insofar as he could recall them. On cross-examination the prosecutor asked Felde whether he had made a certain statement about the crime to Dr. Marceau during the psychiatric interview. Felde responded that he didn't recall making the statement; the prosecutor did not introduce the sanity report of Dr. Marceau nor did he ever recall Dr. Marceau in rebuttal to testify about the statement. Thereafter in the prosecutor's rebuttal closing argument he referred to this statement which Felde allegedly made to Dr. Marceau.

The jury convicted Wayne Robert Felde of first degree murder and thereafter recommended the death sentence following a bifurcated penalty hearing. The defendant appealed

his conviction and sentence to the Louisiana Supreme Court. The conviction and sentence were both affirmed and that Court denied petitioner's application for rehearing. Petitioner has now filed this application for Writ of Certiorari.

ISSUES PRESENTED

Petitioner has claimed that the prosecutor erred in cross-examining him about statements which he purportedly made to Dr. Fred Marceau during the psychiatric sanity commission interview. Petitioner further claims that the prosecutor erred in arguing to the jury that petitioner made certain statements to Dr. Marceau when in fact there was no evidence that these statements had ever been made. Petitioner basis these claims of error on the following grounds:

1. The defendant's Fifth Amendment privilege against compulsory self-incrimination was violated when Dr. Marceau did not advise him of his Miranda rights prior to conducting the psychiatric interview.
2. The defendant's Fifth and Fourteenth Amendment rights were violated because petitioner's statements to Dr. Marceau were not given freely and voluntarily but were the product of his own pain and suffering aggravated by the conduct of police and jailers who harassed him.
3. The petitioner's Sixth Amendment right to confrontation was violated because the prosecutor never introduced evidence that petitioner made the statements in question to Dr. Marceau and thus, petitioner was unable to confront the evidence against him.
4. Petitioner's Sixth Amendment right to counsel was violated because his appointed attorneys did not counsel with him prior to the psychiatric interview, nor were they present during the psychiatric interview with the sanity commission doctors.
5. Petitioner contends that none of these errors were harmless beyond a reasonable doubt.

ARGUMENT

Petitioner alleged insanity at the time of the crime

through his dual plea of not guilty and not guilty be reason of insanity. See La. R. S. 14:14 supra. He offered proof through lay and psychiatric testimony that he suffered from Post-traumatic Stress Disorder, an anxiety disorder which rendered him unable to distinguish right from wrong with reference to his conduct at the time of the crime. According to Dr. John Wilson, a defense expert, one of the symptoms of this illness was the petitioner's inability to recall facts of the traumatic event. [See transcript, pages 1787-1806] Furthermore, Dr. Wilson testified about things which Felde told him about the crime during their psychiatric interview. [Transcript, pages 1804-1805] As a result of Dr. Wilson's interview with Mr. Felde, he concluded that Felde suffered from Post-traumatic Stress Disorder and was legally insane at the time of the crime. [Transcript, page 1806]

Petitioner also called Dr. Charles Figley to testify that petitioner suffers from Post-traumatic Stress Disorder and Dr. Joe Ben Hayes, a psychiatrist, who testified that Felde was legally insane at the time of the crime because of his chronic Post-traumatic Stress Disorder. [Transcript, pages 1943-1945] Dr. Hayes also recounted for the jury a narrative of Felde's life as recounted by Felde during their interview. [1946 et seq]

Thereafter petitioner, Felde, testified in his own defense. He recounted his life before, during and after Vietnam and the events surrounding both homicides. Specifically he testified that at the time Officer Tompkins was shot Felde did not recall whether there was a struggle over the gun. [Transcript, page 2123] In Felde's version

he was attempting suicide when Officer Tompkins pulled him forward. [Transcript, page 2122]

Felde also testified that he would volunteer nothing to the doctors who were appointed to the Sanity Commission because he viewed them as police officers. He was polite but not cooperative. [Transcript, pages 2128-2129] On cross-examination the prosecutor asked Felde if he made certain statements to Dr. Marceau during the sanity interview. The most important statement about which Felde was asked is quoted from the transcript as follows:

"Q. Do you recall telling Dr. Marceau that you vaguely remember pointing the gun at the police officer and telling him to stop and let you out, and when your instructions were not followed, the officer started wrestling with you for the gun, the car hit a guard rail and the gun went off?

A. No I don't." [Transcript, page 2150]

Thereafter petitioner commented he had no objection to the prosecutor reading the statement from Dr. Marceau's report to the jury. [Transcript, page 2151] Later defense counsel and the prosecutor both made references to this statement during the closing arguments. [Transcript, pages 2295 and 2344] Dr. Marceau's report was not introduced into evidence; Dr. Marceau did not testify on rebuttal about the statement Felde made. The petitioner now alleges the prosecutor erred in asking the question about Felde's comments to Dr. Marceau and erred in arguing these comments to the jury.

I THE FIFTH AMENDMENT PRIVILEGE AGAINST
COMPULSORY SELF-INCRIMINATION/LEGALITY OF
THE STATEMENT

Petitioner contends that Dr. Marceau should have

given him Miranda rights prior to the psychiatric interview because the psychiatric interview was the equivalent of custodial interrogation. The State submits that State and Federal jurisprudence holds that the Fifth Amendment privilege against compulsory self-incrimination does not apply at the sanity commission interview because the State cannot use the statements the defendant makes to the doctors as evidence of his guilt. See State vs Jones, 359 So.2d 95, (1978); State vs Breaux, 337 So.2d 182 (1976); U.S. vs Cohen, 530 F.2d 43 (1976).

Other cases have held that what an accused tells a doctor at a sanity commission interview may be admissible evidence against him when the accused has plead insanity and presented evidence of his insanity at trial. In such cases the statements can be used only to determine the issue of the accused's sanity at the time of the crime. U.S. vs Loe, 586 F.2d 1015 (1978) 4th Cir.; U.S. vs Madrid, 673 F.2d 1114 (1982) 10th Cir.; U.S. vs Reason, 549 F.2d 309 ('77) 4th Cir. The cases are clear that this evidence cannot be used by the State to prove guilt. See U.S. vs Leonard, 609 F.2d 1163 (1980) 5th Cir.; Gibson vs Zahradnick, 581 F.2d 75 (1978) 4th Cir.

The State agrees with the reasoning of these cases. The State should not be able to prove the crime by using the defendant's own statements about the crime when he speaks to a Court appointed doctor who seeks to determine his mental capacity to proceed to trial or his sanity at the time of trial. However, when the defendant chooses to place his sanity at issue and presents the trier of fact with lay and expert evidence to support this insanity the

State has a legitimate interest in addressing that issue. The State addresses that issue by testing the physician's basis for his opinion. This necessarily means that the physician must testify about the events of the crime as related by the accused because the physician must make that inquiry in order to give an opinion about the accused's sanity at the time of the crime. In this case the probative value of those recollections by the accused takes on greater significance because Felde's ability to recall facts was one of the symptoms of the mental illness upon which he based his defense. [Transcript, testimony John Wilson] The alleged statement to Marceau was probative on the issue whether Felde actually suffered that illness. Hence the prosecutor was correct in asking the question of Felde.

Petitioner relies upon Estelle vs Smith, 101 S.Ct. 1866 (1981) and New Jersey vs Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979) to support his position. These cases are distinguishable from the issue now presented by Felde's case. In Smith the defendant did not put his sanity at issue, nor did he contest his competency to proceed to trial. He did not request the appointment of any physicians to examine him. Rather the Court appointed a physician on its own motion to examine the accused so that the Court would be sure that the accused was mentally competent to proceed to trial since it was a capital case. At the penalty phase of that case the State called the physician to testify regarding the defendant's propensity for violence. This Court properly equated that testimony with a physician's testimony about the defendant's guilt

and reversed the conviction.

Here the State did not seek to inquire about the information until Dr. Marceau had testified and until later when Mr. Felde had testified after presenting his lay and psychiatric evidence on the issue of his insanity. Estelle expressly distinguished this situation from the facts presented in that case. In Estelle the Court said:

"Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."

In Portash this Court held that the State could not use the compelled Grand Jury testimony of an accused to impeach the accused at his trial. In Portash the accused would never have testified before the Grand Jury except for a grant of immunity under compulsion by the State. Here the accused was not compelled to enter his dual plea and thereby interject into this proceeding the issue of his sanity, nor was he compelled to present lay and psychiatric evidence in support of that defense. Having done so the State was justified in inquiring into the basis and validity of that defense.

Under State law the petitioner also waived this objection by his contemporaneous failure to object during the questioning and at the argument stage.⁶

⁶ La. C. Cr. P. Article 841 - "An irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take, or of his objections to the action of the Court, and the grounds therefore.

The requirement of an objection shall not apply to the Court's ruling on any written motion."

Petitioner's counsel specifically told the Court he had no objection to the prosecutor reading the contested statement to the jury. [Transcript, page 2151] Hence the error was not properly preserved and should not be reviewed by this Court.

The State submits that petitioner's Fifth Amendment privilege against compulsory self-incrimination was not violated by the prosecutor's questioning of Felde. The error, if any, occurred in the prosecutor's argument to the jury about a statement which was not in evidence. However, as stated above, petitioner did not contemporaneously object to the argument and hence waived this error. See La. C. Cr. P. Article 841. Moreover, any error in this regard was not of constitutional dimension nor did it effect the verdict in any significant way. [See Louisiana Supreme Court opinion 422 So.2d 370 (1982), at page 18] Thus, this issue is without merit and should be rejected by the Court.

[THE VOLUNTARINESS OF THE STATEMENT]

Petitioner also claims that his Fifth and Fourteenth Amendment rights were violated because any statements he made to Dr. Marceau were not freely and voluntarily made. They were, he contends, the product of his own pain and suffering aggravated by his harassment by police and jailers.

The record shows that Felde was seriously wounded when police arrested him. He was hospitalized and his life was saved through good medical care. [Transcript, pages 1712-1735] About three months after being wounded Felde saw the three members of the Sanity Commission in separate meetings. According to Dr. Marceau and Dr. Braswell, Felde never complained of harassment at the hands of the police or his jailers.

[Transcript, 936; 1148] All three physicians were able to communicate with him and he was able to communicate with them. It is highly unlikely that the elderly Dr. Marceau coerced Wayne Felde into saying anything. [See petitioner's description of Dr. Marceau at page 30 of his application.]

Furthermore Felde testified that he did not trust the doctors and viewed them as policemen. While he was polite to them he was not cooperative. This is the best evidence that what Felde said was not coerced but was exactly what he wanted them to hear. [Transcript, 2128; 2129; 2150]

From this factual background the State submits that the voluntary predicate required by State law⁷ and the constitution was properly laid. Felde's statements were voluntary.

The State further submits that since these statements were voluntary the State could properly impeach the accused with these statements even if the Court should find that Miranda warnings were required by the Sanity Commission doctors. See Harris vs New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2nd 1 (1971); U.S. vs Castenada, 555 F.2d 605 (1977) 7th Cir. But also see U.S. vs Leonard, 609 F.2d 1163 (1980) 5th Cir. by comparison. The State submits that statements which Felde made to Dr. Marceau were freely and voluntarily made and that the State was justified in seeking to impeach him with them. This issue is without merit.

⁷ La. R. S. 15:451 - "Before what purposes to be a confession can be introduced into evidence it must be affirmatively shown that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Petitioner complains that his Sixth Amendment right to confrontation was violated because the prosecutor never introduced evidence that Felde made the statement in question to Dr. Marceau. Hence he was denied his right to confront the evidence on that issue. Petitioner's claim must fail for the following reasons:

1. Earlier in the trial petitioner prevented Dr. Marceau from testifying about the substance of these statements through his objections. [Transcript, pages 1152-1172]
2. Petitioner complains that the statements were inadmissible as evidence because his Fifth, Fourteenth and Sixth Amendment rights were violated. This position is inconsistent with the current allegation.
3. Petitioner did not object on this basis in argument and thereby waived his objection to the present question at trial. See La. C. Cr. P. Article 841 supra.

Moreover it can clearly be seen from petitioner's closing argument that he addressed this issue satisfactorily. [Transcript, page 2295] This issue is therefore without merit.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

Petitioner claims that his Sixth Amendment right to counsel was violated because his lawyers did not consult with him prior to the psychiatric interview and because his lawyers were not present during the psychiatric interview. This claim is without merit because petitioner never raised this question at trial nor on appeal to the Louisiana Supreme Court. [See the opinion of the Louisiana Supreme Court at 422 So.2d 370 (1982) and La. C. Cr. P. Article 841.] Thus the Louisiana Supreme Court has not decided this issue. This Court should not grant a Writ of Certiorari on a question which the State court of last resort has not addressed.

This claim must fail on its merits as well. Petitioner relies on Estelle vs Smith supra for the proposition

that he was denied effective assistance of counsel by the State when the lawyers did not consult with him before the psychiatric interview. The distinction between this case and Estelle is significant. In Estelle the accused's lawyer was not notified of the purpose of the psychiatric examination. There the Court found that the State actively interfered with his right to counsel. In Felde the lawyers knew the purpose of the examination was to determine his sanity at the time of the crime. Indeed it may have been in Felde's best interest to be candid with the physicians at the psychiatric interview. At any rate, there is no showing in this record that the State in any way interfered with the petitioner's right to counsel. The remainder of the allegation about the lawyers is a reference to ineffective assistance of counsel. The State denies this claim on the merits and because this petition is not the proper procedural vehicle to raise this claim.

Petitioner's claim must also fail because his lawyers had no legal right to be present during the psychiatric interview. The jurisprudence is clear that a criminal accused who has plead insanity is not entitled to have the presence of his lawyer at this interview. See U.S. vs Cohen supra, State vs Breaux, 337 So.2d 182 and Estelle vs Smith, 101 S.Ct. 1866 (footnote fourteen) and the case cited therein. The lawyer's presence at the interview could interfere with the free flow of information which is critical to the doctor who must give the Court an opinion about the accused's sanity at the time of the crime. Since the accused's statements to that doctor cannot be used to prove his guilt or to punish him this psychiatric interview is not a critical stage at which the presence of counsel is required. Thus, Felde's Sixth Amendment right to counsel

claim must fall.

CONCLUSION

The State of Louisiana prays that this Honorable Court deny the petitioner's application for Writ of Certiorari in this case for the reasons which the State has set forth in its opposition.

Respectfully submitted,

STATE OF LOUISIANA

BY:

Dale G. Cox
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C E R T I F I C A T E

I certify that a copy of the foregoing Response has been served upon Nathaniel Graves Thomas, 1217 Oakland Street, Shreveport, Louisiana 71101, attorney for the petitioner, Wayne Robert Felde, by placing same in U. S. Mail this 4th day of April, 1983.

Dale G. Cox
DALE G. COX

FOOTNOTES

¹R. S. 14:30 defined first degree murder at that time as: "First degree murder is the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with a recommendation of the jury."

²R. S. 14:14 defined insanity as: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."

³La. C. Cr. P. Article 650 provides "when a defendant enters a combined plea of 'not guilty and not guilty by reason of insanity' the court may appoint a sanity commission as provided in Article 644 to make an examination as to the defendant's mental condition at the time of the offense. The court may also order the commission to make an examination as to the defendant's present mental capacity to proceed. Mental examinations and reports under this article shall be conducted and filed in conformity with Articles 644-646."

Article 644 - "(A) Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana, and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies.

(B) The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

(C) For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other criminal proceedings."

Article 645 - "The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost."

Article 646 - "The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination."

⁴R. S. 14:15 - "The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, except as follows:

(1) Where the production of the intoxicated or drugged condition has been involuntary, and the circumstances indicate this condition is the direct cause of the commission of the crime the offender is exempt from criminal responsibility.

(2) Where the circumstances indicated that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime."

⁵The trial judge sustained defense counsel's objection to the prosecutor's attempts to cross-examine Dr. Marceau about the substance of Mr. Felde's statements regarding the crime during the psychiatric interview. The trial judge ruled that these statements at this point in the trial were protected by Mr. Felde's Fifth Amendment privilege against compulsory self-incrimination. [See Felde's Petition for Certiorari Appendix Part D, pages 1147-1172]